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No. 75-187

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT P. KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the expungement of his prior state felony conviction by a state administrative agency precluded his indictment for possession of a firearm by a convicted felon under 18 U.S.C. App. 1202(a)(1).[1]

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[1] In pertinent part, 18 U.S.C. App. 1202(a) provides:

Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a

The facts are stipulated. (Pet. App. 16-17) On August 31, 1970, petitioner was convicted in a Minnesota court of robbery, a felony. He was committed to the custody of the State Youth Conservation Commission and incarcerated at the Minnesota State Reformatory. On August 16, 1973, the Commission granted petitioner an "order of discharge and restoration of civil rights" pursuant to Minn. Stat. Ann. (1972 ed.) § 242.31 (Pet. App. 17).[2] On March 1, 1974, petitioner was arrested in possession of a firearm which he had received in interstate commerce, and was thereafter indicted in the United States District Court for the District of Minnesota for violation of 18 U.S.C. App. 1202(a). The district court

> felony * * * and who receives, possesses, or transports in commerce * * * any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[2] In pertinent part, Minn. Stat. Ann. (1972 ed.) § 242.31 provides:

> Whenever a person committed to the commission upon conviction of a crime is discharged from its control * * *, such discharge shall, when so ordered by the commission, restore such person to all civil rights and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof. The commission shall file a copy of the order with the district court of the county in which the conviction occurred, whereupon the court shall order the conviction set aside.
>
> * * * Such orders restore the defendant to his civil rights and purge and free him from all penalties and disabilities arising from such conviction and it shall not thereafter be used against him, except in a criminal prosecution for a subsequent offense if otherwise admissible therein.

dismissed the indictment, ruling that "because the state of Minnesota ha[d] set aside and nullified [petitioner's] prior state conviction * * * [petitioner could] not be classed as a felon at the time of his alleged offense under 18 U.S.C. App. § 1202(a)(1)" (Pet. App. 10). On appeal by the United States, the court of appeals reversed, thus allowing reinstatement of the indictment (Pet. App. 11-15).

The judgment of the court of appeals was entered June 11, 1975, and a petition for rehearing and rehearing *en banc* was denied July 2, 1975. The petition for a writ of certiorari was filed on August 2, and is therefore out of time under Rule 22(2) of the Rules of the Court. There is, in any event, no occasion for further review by this Court.

1. There is no merit to petitioner's claim that the state commission's order restoring his civil rights removed his federal disability under 18 U.S.C. App. 1202(a)(1) from receiving or possessing a firearm. Quite apart from the fact that the Minnesota statute permits use of an expunged conviction "in a criminal prosecution for a subsequent offense if otherwise admissible" (p. 2, n. 2, *supra*), the federal statute contains no exceptions for persons whose convictions are expunged under the varying laws of the states. 18 U.S.C. App. 1203(2) exempts from the statute only

> person[s] who ha[ve] been pardoned by the President of the United States or the chief executive of a State and ha[ve] expressly been authorized by the President or such chief executive * * * to receive, possess, or transport in commerce a firearm.

Petitioner has neither been pardoned nor authorized to possess a gun. He "belongs to a general class of convicted felons whose civil rights have been restored by a statute that is silent with respect to" possession of firearms. *United States* v. *Mostad*, 485 F.2d 199, 200 (C.A. 8), certiorari denied, 415 U.S. 947. As the court below, upon whose decision we rely, correctly noted (Pet. App. 14):

> By specifically providing that it would recognize only certain pardons, Congress indicated that it did not wish to recognize other means which the states might employ to expunge felony convictions or to restore civil rights. Thus, Congress permitted the arming of those ex-offenders who had been individually considered and approved by a chief executive, but chose not to permit the arming of ex-offenders who receive automatic treatment under general rehabilitation statutes.

Moreover, Congress may properly accord a state pardon differing effect in differing contexts, for "[n]either the inherent nature of a pardon nor full faith and credit require that a state pardon automatically relieve federal disabilities." *Thrall* v. *Wolfe*, 503 F.2d 313, 316 (C.A. 7), certiorari denied, 420 U.S. 972.[3]

[3] Petitioner also contends that because of the language of the state expungment order, he was not given "fair warning" that he would violate 18 U.S.C. App. 1202(a)(1) by acquiring a firearm (Pet. 5). While the court of appeals discussed the need generally for Minnesota officials to warn discharged persons about their disability under federal law to carry firearms, it expressly noted that petitioner did not raise this issue (Pet. App. 14-15). It should not, therefore, be considered by this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. At all events, there is no merit to petitioner's claim that under the statute the government need prove specific intent to violate the law or knowledge on the part of the accused that he was violating the law. See *United States* v. *Mostad, supra; United States* v. *Wiley*, 478 F.2d 415, 417-418 (C.A. 8), certiorari denied, 419 U.S. 879. Moreover, this is not an issue going to the sufficiency of the indictment.

2. Petitioner also argues (Pet. 4) that the decision below conflicts with *United States* v. *Hoctor*, 487 F. 2d 270 (C.A. 9). There is no present conflict. The *Hoctor* decision concerned the effect of a state expungement statute on a federal prosecution of a former felon who had transported explosives in interstate commerce, in violation of 18 U.S.C. 842(i). Unlike the panel's view of that statute, the prohibition against firearms possession by persons convicted of a felony contains a specific provision (18 U.S.C. App. 1203(2), *supra*) defining the only circumstance when such persons may have a gun. But cf. 18 U.S.C. 845(b). Moreover, the Ninth Circuit is now considering *en banc* an appeal involving a prosecution under 18 U.S.C. App. 1202(a)(1), which will determine its position on the precise issue presented here. *United States* v. *Potts*, C.A. 9, No. 74-1817. If the forthcoming decision of the Ninth Circuit in *Potts* in fact conflicts with the decision below, there will be time enough for petitioner to raise the matter in the event he is convicted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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